12-28-2012

State v. Parmer Appellant's Brief Dckt. 39203

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39203
	)	
v.	)	
	)	
CODY WILLIAM PARMER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature of the Case

Cody Parmer was charged with rape, with both statutory and forcible rape charges as alternate theories of the offense. Following a jury trial, Mr. Parmer was convicted of battery with the intent to commit rape. He timely appeals from his judgment of conviction and sentence, and asserts that the prosecutor in this case engaged in a pattern of misconduct in the cross-examination of a defense witness that requires reversal of his conviction.

Statement of the Facts and Course of Proceedings

Cody Parmer was charged with rape and battery with the intent to commit rape. (R., pp.60-61.) The State charged two alternative theories of rape within its Information – both forcible rape and statutory rape. (R., pp.60-61.)

At trial, the State presented the testimony of S.H.'s mother, Loretta Gladish. (Trial Tr.[1], p.186, Ls.7-25.) Ms. Gladish testified that S.H.'s birthdate was [redacted] (Trial Tr., p.187, Ls.1-4.) On the night of the alleged rape, Ms. Gladish was travelling in Montana, but she came home early the next morning after receiving a phone call from S.H. (Trial Tr., p.188, L.4 – p.189, L.24.) Upon arriving, Ms. Gladish went to Kootenai Medical center where S.H. was present in the emergency room. (Trial Tr., p.190, L.7 – p.191, L.1.) According to Ms. Gladish's testimony, S.H. appeared to be

[1] The record on appeal in this case contains multiple volumes of transcripts of proceedings. For ease of reference, citations made to the primary volume of transcripts, which contains the trial transcript along with the transcripts of several other hearings, is referred to herein as "Trial Tr." All other citations to the transcripts of proceedings are made in accordance with the date of the proceeding transcribed.

upset and crying. (Trial Tr., p.191, Ls.14-16.) There were also bite marks on S.H.'s body that were not present on the previous day. (Trial Tr., 192, L.2 – p.195, L.16.)

Next, the State presented the testimony of Kari Hydorn, a friend of S.H. who also attended vocational training with her. (Trial Tr., p.199, L.21 – p.200, L.18.) Ms. Hydorn testified that, on the morning of April 8, 2010, she received a call from S.H. who relayed that something had happened to her and she needed Ms. Hydorn to give her a ride. (Trial Tr., p.201, Ls.4-21.) In response to this call, Ms. Hydorn and her boyfriend got dressed and walked down the road to meet S.H. (Trial Tr., p.202, Ls.4-11.)

Despite the cold weather, S.H. was dressed only in a tee shirt and shorts, and was sitting beneath the awning of a store overhang. (Trial Tr., p.202, L.12 – p.203, L.14.) Ms. Hydorn brought S.H. back to her home, gave her shoes and socks, and asked S.H. whether she wanted to go to the hospital. (Trial Tr., p.203, Ls.15-24.) S.H. refused to go to the hospital at the time and left Ms. Hydorn's house. (Trial Tr., p.203, Ls.23-24.) Ms. Hydorn also testified that, during the time S.H. was at her house, she observed blood on S.H.'s underwear while she was changing clothes. (Trial Tr., p.209, Ls.2-21.)

Following this testimony, the State called Misty Delaney-Huff to the stand. (Trial Tr., p.211,L.24 – p.212, L.11.) Ms. Delaney-Huff was another of S.H.'s friends, and was the next person that S.H. called on the morning of April 8. (Trial Tr., p.212, L.24 – p.214, L.4.) After calling Ms. Delaney-Huff early that morning, S.H. arrived at Ms. Delaney-Huff's home looking distraught. (Trial Tr., p.214, Ls.14-23.) After talking for approximately 15 minutes, Ms. Delaney-Huff drove S.H. to the hospital. (Trial Tr., p.215, Ls.3-7.) According to Ms. Delaney-Huff's testimony, S.H.'s demeanor

alternated between crying, acting angry, and falling into non-responsiveness. (Trial Tr., p.215, L.24 – p.216, L.4.)

S.H. testified next for the State. (Trial Tr., p.218, Ls.2-6.) She first testified that, prior to the night of the alleged rape, she was familiar with one of Mr. Parmer's friends, Amanda Seeling, although she did not know Mr. Parmer prior to that night. (Trial Tr., p.219, L.18 – p.221, L.22.) Earlier that day, S.H. had seen Ms. Seeling at a local mall with Mr. Parmer. (Trial Tr., p.220, L.20 – p.221, L.10.) Later that same day, S.H. and Ms. Seeling exchanged texts and made plans to hang out at Ms. Seeling and Mr. Parmer's house that night. (Trial Tr., p.221, L.25 – p.222, L.9.) S.H. went over to Mr. Parmer's house at around ten that evening. (Trial Tr., p.222, Ls.10-11.)

When S.H. arrived, Ms. Seeling, Mr. Parmer, and another man named Levi Bornschein[2] were at the house. (Trial Tr., p.222, L.23 – p.223, L.5.) At some point that night, everyone went to a downstairs basement bedroom to play cards, listen to music, and drink alcohol. (Trial Tr., p.223, L.12 – p.225, L.7.) Eventually S.H., Ms. Seeling, Mr. Parmer, and Levi started to dance to the music that was playing. (Trial Tr., p.229, Ls.16-19.)

While everyone was dancing, according to S.H.'s testimony, Mr. Parmer attempted to put his hands down her pants and to bite her neck. (Trial Tr., p.232, Ls.7-21.) S.H. testified that both she and Ms. Seeling told Mr. Parmer to stop. (Trial Tr., p.232, Ls.15-17.) According to her testimony, Mr. Parmer bit down sufficiently hard to cause her pain. (Trial Tr., p.233, Ls.7-8.) S.H. testified that she then decided to lay

[2] Although S.H. was unable to identify Mr. Bornschein's last name, the jury was provided with this information through Ms. Seeling's subsequent testimony. (*See* Trial Tr., p.580, L.22.)

down on the bed in the downstairs bedroom because her stomach was upset. (Trial Tr., p.233, Ls.12-19.)

Shortly after S.H. laid down on the bed, Ms. Seeling joined her, and Mr. Parmer subsequently did as well. (Trial Tr., p.234, L.15 – p.235, L.3.) After a time, according to S.H.'s testimony, Ms. Seeling got out of bed and went upstairs. (Trial Tr., p.235, Ls.15-18.) S.H. testified that she and Mr. Parmer remained downstairs in bed. (Trial Tr., p.235, L.22 – p.236, L.1.)

S.H. claimed that, once Ms. Seeling left the room, Mr. Parmer rolled on top of her, put his hands down her pants, and attempted to take off her shorts. (Trial Tr., p.236, Ls.17-23.) She also testified that Mr. Parmer inserted his penis in her vagina, at which point she told him to stop. (Trial Tr., p.236, Ls.17-23.) S.H. further claimed that Mr. Parmer was repeatedly biting her in an attempt to overcome her protests. (Trial Tr., p.236, Ls.17-23.) S.H. claimed that Mr. Parmer had one leg between hers and his other leg across her other side at the time. (Trial Tr., p.237, L.22 – p.238, L.4.) According to her testimony, she both verbally and repeatedly told Mr. Parmer to stop, as well as physically attempted to dislodge him by pushing against him with her hands and shoulder. (Trial Tr., p.238, Ls.12-24.)

According to S.H.'s testimony, Mr. Parmer eventually got off of her, at which point she grabbed her backpack and ran out of the home without bothering to put any shoes on. (Trial Tr., p.240, L.22 – p.241, L.4.) She then called her friend, Ms. Hydorn, to pick her up, who subsequently took S.H. to another friend's home. (Trial Tr., p.241, Ls.5-19.) S.H. thereafter went to the hospital. (Trial Tr., p.241, Ls.22-24.)

When asked about a series of bite marks that were photographic exhibits at trial, S.H. identified Mr. Parmer as the person who had bit her. (Trial Tr., p.242, L.5 – p.244,

L.23.) S.H. admitted that, when confronted by police investigating whether she had been raped, she had not been truthful with regard to her having consumed alcohol. (Trial Tr., p.244, L.24 – p.245, L.5.) However, she claimed that she only lied to the officer about this fact because she was too young to legally consume alcohol and did not want to get in trouble. (Trial Tr., p.245, Ls.6-15.) S.H. testified that she later admitted to have been drinking to police. (Trial Tr., p.245, Ls.12-15.)

On cross-examination, S.H. admitted that Mr. Parmer had previously put his hands down her pants while they were dancing, but that she made no attempt to leave, nor did she try to leave when Mr. Parmer initially tried to put his hands down her pants when they were laying down on Ms. Seeling's bed later that night. (Trial Tr., p.288, Ls.4-25.) S.H. further admitted that she never called out for help during the alleged rape, despite the fact that Mr. Bornschein was downstairs on a couch that was only six feet away and Ms. Seeling was right upstairs. (Trial Tr., p.290, L.20 – p.292, L.9.) Nor did S.H. go with Ms. Seeling upstairs instead of remaining with Mr. Parmer in bed. (Trial Tr., p.289, Ls.4-24.)

After S.H.'s testimony, the State called Officer Greg Moore, of the Coeur d'Alene police department, to the stand. (Trial Tr., p.305, Ls.8-13.) Officer Moore responded to Kootenai Medical Center upon a report of a possible sexual assault. (Trial Tr, p.306, L.17 – p.307, L.8.) Upon talking to S.H., the officer believed her demeanor to be reserved and possibly frightened. (Trial Tr., p.308, L.13 – p.309, L.9.) The officer also took some pictures of S.H. (Trial Tr., p.309, Ls.7-9.) These pictures were of bite marks that the officer saw on S.H.'s body. (Trial Tr., p.310, Ls.2-5.)

From the hospital, Officer Moore then left for Mr. Parmer's house along with two other officers. (Trial Tr., p.310, L.6 – p.311, L.10.) One of Mr. Parmer's roommates

answered the door and allowed the officers inside. (Trial Tr., p.311, Ls.11-22.) Officer Moore first spoke with Ms. Seeling, then went downstairs to photograph the basement and take several items from the basement area. (Trial Tr., p.312, Ls.2-25.) Next, the officer spoke with Mr. Parmer on the front steps of the house. (Trial Tr., p.313, Ls.10-13.) The State introduced a recording of the officer's interrogation of Mr. Parmer while on the front steps of Mr. Parmer's house. (Trial Tr., p.314, L.11 – p.320, L.6; State's Ex. 3A.) During this conversation, Mr. Parmer admitted to having bitten S.H. on the neck, and acknowledged that it was possible that he had "made out" with her while he was drunk, but flatly denied that the two had had sex. (State's Ex. 3A.)

After this interrogation, Mr. Parmer was placed under arrest and was initially being transported to jail. (Trial Tr., p.321, Ls.14-17.) But while on the way, Officer Moore changed his mind and took Mr. Parmer to be questioned again by another officer. (Trial Tr., p.321, L.23 – p.322, L.3.) After dropping Mr. Parmer off to be questioned, Officer Moore then returned to the hospital to retrieve the rape kit performed on S.H. (Trial Tr., p.324, Ls.18-23.)

The detective who subsequently interrogated Mr. Parmer, Detective Tracy Martin, testified next for the State. (Trial Tr., p.338, Ls.11-16.) The digital video recording of the interrogation, along with Mr. Parmer's sworn statement obtained by the detective, were admitted into evidence. (Trial Tr., p.342, L.2 – p.344, L.3; State's Ex. 4A, 4B.) Additionally, Detective Martin testified that he obtained swabs of Mr. Parmer's inner cheek and penis that were voluntarily provided by Mr. Parmer. (Trial Tr., p.349, L.15 – p.351, L.22.)

The emergency room physician who attended S.H. during the rape kit, Dr. Michael Ettner, also testified at trial. (Trial Tr., p.362, Ls.9-15.) He testified that

S.H. claimed to have been raped by the roommate of a friend of hers during this exam. (Trial Tr., p.368, Ls.7-15.) Dr. Ettnes also stated that S.H. physically appeared to be upset, had multiple bite marks present on her body, and had a "scant" amount of blood in her vaginal canal. (Trial Tr., p.368, L.20 – p.372, L.10.) There was no other trauma noted with regard to S.H.'s vaginal area. (Trial Tr., p.371, Ls.14-22.) Additionally, the washings taken as part of the rape kit were negative for the presence of sperm. (Trial Tr., p.373, Ls.7-9.) With regard to the bite marks, the doctor testified that there was no blood on these marks, nor was there any broken skin. (Trial Tr., p.374, Ls.10-15.)

Jennifer Wayman, an emergency room nurse who assisted with the rape kit performed on S.H., testified next. (Trial Tr., p.378, Ls.8-18.) Ms. Wayman testified that, in the course of assisting with the rape kit, she took several swabs of the bite marks that were on S.H.'s body. (Trial Tr., p.383, L.13 – p.384, L.19.) These swabs were collected and turned over to police for testing. (Trial Tr., p.384, L.20 – p.388, L.18.)

The State next called Rylene Nowlin to the stand. Ms. Nowlin is a forensic scientist at the Idaho State Police Forensic Services Laboratory. (Trial Tr., p.418, Ls.3-11.) Ms. Nowlin testified that she is employed in the biology DNA[3] unit, where her duties included examination of items in order to detect the presence of bodily fluids, and testing for DNA if bodily fluids have been identified. (Trial Tr., p.419, Ls.3-11.) In conjunction with her duties, Ms. Nowlin received and tested several items she had received from police in conjunction with this case. (Trial Tr., p.434, L.13 – p.437, L.18.) Ms. Nowlin testified that she only identified a single sperm head from all of the four vaginal swabs that were taken from S.H., and that this provided an insufficient sample of genetic material to support DNA testing. (Trial Tr., p.p.437, L.5 – p.438, L.6, p.444,

[3] Deoxyribonucleic acid.

Ls.16-22.) However, Ms. Nowlin testified that the swabs taken from the bite marks on S.H. indicated a mixed profile of genetic contributors and that Mr. Parmer could not be excluded as being one of the contributors. (Trial Tr., p.439, L.8 – p.443, L.22.)

On cross-examination, Ms. Nowlin testified that there was no way to determine the age of the sperm head that she believed she detected on one of the swabs taken from S.H. (Trial Tr., p.470, L.25 – p.471, L.10.) Likewise, she was unable to tell how it got to S.H. (Trial Tr., p.471, Ls.17-19.) Further, there were no cells of any type that Ms. Nowlin detected from the vaginal swabs of S.H. that showed any DNA foreign to S.H. (Trial Tr., p.472, Ls.12-14.) And none of the penile swabs taken from Mr. Parmer had any DNA foreign to him that was detected. (Trial Tr., p.477, Ls.1-7.)

Following Ms. Nowlin's testimony, the State rested and Mr. Parmer called his first witness, Dr. Raymond Grimsbo. (Trial Tr., p.493, L.13; p.515, Ls.6-8.) Dr. Grimsbo is a forensic scientist at Intermountain Forensic Science. (Trial Tr., p.515, Ls.9-13.) In conjunction with his employment, Dr. Grimsbo is trained in the analysis of sexual assault kits, and was asked by Mr. Parmer to examine the sexual assault kit in this case to determine whether there was any sperm present on the materials taken from S.H. (Trial Tr., p.520, L.2 – p.521, L.13.) After receiving the slide upon which Ms. Nowlin believed she detected a sperm head, Dr. Grimsbo examined this slide to see if he could find and identify the sperm head. (Trial Tr., p.522, L.20 – p.523, L.6.) Dr. Grimsbo was not able to identify any sperm on the slide. (Trial Tr., p.523, Ls.7-13.) Accordingly, the doctor could neither confirm nor deny the presence of any sperm. (Trial Tr., p.525, Ls.6-9.) Dr. Grimsbo also testified that the finding of a single sperm head does not, of itself, show penile penetration to a scientific certainty. (Trial Tr., p.528, L.10 – p.529, L.8.)

The other witness presented by Mr. Parmer was Ms. Seeling. (Trial Tr., p.580, Ls.10-12.) Ms. Seeling testified that she was present on the night of the alleged rape, along with Mr. Parmer, S.H., and Mr. Bornschein. (Trial Tr., p.580, L.24 – p.581, L.4, p.583, Ls.18-24.) According to her testimony, Ms. Seeling invited S.H. to hang out earlier in the day. (Trial Tr., p.581, Ls.7-24.) Ms. Seeling and Mr. Parmer were drinking and dancing when S.H. came over sometime between ten and eleven o'clock that night. (Trial Tr., p.583, Ls.3-14.)

Ms. Seeling testified that, while everyone was dancing in Ms. Seeling's basement bedroom, S.H. was kissing both her and Mr. Parmer. (Trial Tr., p.585, L.20 – p.586, L.13.) She also testified that Mr. Parmer bit both her and S.H. while they were dancing. (Trial Tr., p.589, L.22 – p.590, L.1.) Later that night, Ms. Seeling, S.H. and Mr. Parmer decided to hang out on a bed and talk. (Trial Tr., p.586, L.23 – p.588, L.7.) According to Ms. Seeling's testimony, S.H. placed her hand down both her and Mr. Parmer's pants. (Trial Tr., p.589, Ls.4-11.) Ms. Seeling did not believe that either she or Mr. Parmer were touching S.H. at this time. (Trial Tr., p.589, Ls.20-21.)

Ms. Seeling testified that Mr. Parmer also bit S.H. again when the three of them were on her bed, and that S.H. stated that the bite hurt. (Trial Tr., p.590, Ls.15-22.) Ms. Seeling eventually fell asleep. (Trial Tr., p.591, Ls.19-21.) At some point, Ms. Seeling woke up and went to a nearby table to smoke a cigarette. (Trial Tr., p.592, Ls.7-22.) Ms. Seeling observed Mr. Parmer on top of S.H. when she went to have a cigarette. (Trial Tr., p.592, Ls.7-11.) Ms. Seeling testified that, when she finished her cigarette, she returned to bed, nudging Mr. Parmer and S.H. over to the side so that there was room for her to sleep. (Trial Tr., p.595, L.18 – p.596.) When Ms. Seeling asked S.H. to move over, S.H. told Ms. Seeling that she was scared. (Trial Tr., p.596,

Ls.8-12.) Ms. Seeling testified that she told S.H. that she should fall asleep and that S.H. would be okay. (Trial Tr., p.596, Ls.8-12.) She never heard S.H. say "no" or tell Mr. Parmer to stop that night, and Ms. Seeling further denied she ever told Mr. Parmer to leave S.H. alone. (Trial Tr., p.592, L.4 – p.593, L.13.)

Ms. Seeling also testified that S.H. had already left when she woke up the next morning. (Trial Tr., p.597, Ls.13-19.) While Ms. Seeling attempted to text S.H. to see where she went, Ms. Seeling did not receive a reply from S.H. until later that morning when S.H. responded that she was at the hospital. (Trial Tr., p.597, Ls.13-19.) Close to the same time, police arrived at Ms. Seeling and Mr. Parmer's house. (Trial Tr., p.597, Ls.13-22.)

On cross-examination, Ms. Seeling admitted that she was friends with Mr. Parmer and that she had invited S.H. over that evening because Mr. Parmer expressed an interest in S.H. (Trial Tr., p.598, Ls.8-9; p.600, L.25 – p.601, L.6.) However, Ms. Seeling was having difficulty responding to some of the State's questions due to the fact that she could not recall some of the specifics of the night in question. (Trial Tr., p.605, Ls.12-13.) At the point where Ms. Seeling expressed difficulty recalling the facts asked for, the State then provided Ms. Seeling with a transcript of a prior interview she participated in that was conducted by the prosecutor and police, expressly doing so on the basis of refreshing Ms. Seeling's recollection of some of her prior statements. (Trial Tr., p.605, Ls.12-25.)

Despite having represented that the transcript of Ms. Seeling's prior, unsworn statement was only being offered to refresh Ms. Seeling's recollection, the prosecutor made multiple attempts to place the substance of these prior statements into evidence before the jury, over Mr. Parmer's objections. (Trial Tr., p.606, L.9 – p.614, L.2.) The

prosecutor likewise asked several questions that were deemed to be inadmissible as argumentative and inflammatory – and frequently repeated the same question or a virtually identical one following the district court's rulings sustaining Mr. Parmer's objections. (Trial Tr., p.611, L.15 - p.638, L.24.) Ultimately, the district court found it necessary to admonish the prosecutor for doing so. (Trial Tr., p.613, L.21 – p.614, L.2, p.626, Ls.12-20; p.638, Ls.20-24.)

Mr. Parmer elected not to testify at trial. (Trial Tr., p.644, L.1 – 646, L.3.) The jury acquitted Mr. Parmer of rape, but convicted him of the lesser included offense of battery with the intent to commit rape. (Trial Tr., p.708, Ls.3-11; R., pp.249-250.) Mr. Parmer was sentenced to 15 years, with six years fixed, upon his conviction of battery with the intent to commit rape. (Trial Tr., p.778, L.25 – p.779, L.3; R., pp.302-304.) The district court further retained jurisdiction over his case and subsequently placed Mr. Parmer on probation for a term of five years. (Trial Tr., p.778, L.25 – p.779, L.3; R., pp.302-304; Order Suspending Execution of Judgment and Sentence Following Retained Jurisdiction, Augment.[4]) Mr. Parmer timely appeals from his judgment of conviction and sentence.

[4] Mr. Parmer has sought to augment the record on appeal with copies of the minutes from the rider review hearing held in his case, as well as the district court's order placing him on probation, through a motion to augment the record that is filed contemporaneously with this brief.

ISSUE

Did the prosecutor engage in a pattern of misconduct in cross-examination that requires reversal in this case?

ARGUMENT

The Prosecutor Engaged In A Pattern Of Misconduct In Cross-Examination That Requires Reversal In This Case

A. Introduction

The prosecutor in this case engaged in a pattern of cross-examination of Ms. Seeling wherein the prosecutor would ask improper questions of this witness and, upon receiving an adverse ruling from the district court as to the propriety of these questions, would deliberately repeat the same offending question before the jury. At times, the prosecutor would repeat the exact same question immediately after the district court sustained an objection to it. Mr. Parmer asserts that this pattern of disregarding the district court's rulings, seeking to place inadmissible evidence before the jury, and seeking to inflame the passions and prejudice of the jurors constituted prosecutorial misconduct that was not harmless either individually or collectively.

B. Standard Of Review

Because Mr. Parmer objected to the alleged misconduct in this case, this Court applies a two-tiered standard of review to his claim on appeal. First, this Court examines whether misconduct occurred. *State v. Perry*, 150 Idaho 209, 221-222, 225-227 (2010). If this Court finds that there was prosecutorial misconduct in this case, then the State bears the burden to prove, beyond a reasonable doubt, that the error was harmless. *Id.* Prosecutorial misconduct cannot be deemed harmless by this Court unless this Court can declare a belief, beyond a reasonable doubt, that the error complained of did not contribute to the jury's verdict. *Id.* at 225-227.

C. The Prosecutor Engaged In A Pattern Of Misconduct In Cross-Examination That Requires Reversal In This Case

"It is the primary and fundamental duty of the prosecuting attorney and his assistants to see that an accused receives a fair trial." *State v. Wilbanks*, 95 Idaho 346, 353 (1973). In furtherance of this duty, a prosecutor must, "guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced." *State v. Irwin*, 9 Idaho 35, 44 (1903). The United States Supreme Court has delineated the contours of this duty as follows:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocent suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much a duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 75, 88 (1935).

The Idaho Supreme Court has further defined the powers and duties of prosecutors in Idaho with regard to ensuring each defendant's right to a fair trial:

> Every person accused of a crime in Idaho has the right to a fair and impartial trial, whether guilty or innocent. We long ago held [i]t is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury. They should not exert their skill and ingenuity to see how far they can trespass upon the verge of error, [because] generally in so doing they transgress upon the rights of the accused. Prosecutorial misconduct includes asking questions where the answer is inadmissible, but the jury can infer what the answer would have been simply from the question asked.

State v. Christiansen, 144 Idaho 463, 469 (2007) (internal quotations and citations omitted).

It constitutes prosecutorial misconduct for a prosecutor to use inflammatory language in describing a witness or a defendant, to misrepresent or mischaracterize the evidence, or to appeal to the passions or prejudice of the jurors. *See, e.g., State v. Phillips*, 144 Idaho 82, 86-87 (Ct. App. 2007). It is also misconduct for a prosecutor to ignore a trial court's ruling sustaining an objection, and thereafter persist in the same type of questioning deemed to be inadmissible. *See, e.g., State v. Ellington*, 151 Idaho 53, 63 (2011); *State v. Erickson*, 148 Idaho 679, 683-684 (Ct. App. 2010); *State v. Martinez*, 136 Idaho 521, 525-526 (Ct. App. 2001). "The court should not have to lecture the prosecutor in front of the jury in order to get its point across that the current line of questioning is inappropriate and the prosecutor should move on to a different one." *Ellington*, 151 Idaho at 63.[5]

The instances of the prosecutor in this case flatly ignoring the district court's rulings regarding the impermissibility of his questions are both numerous and extensive.

In the first instance of this misconduct, upon Ms. Seeling testifying that, at the time of trial, she lacked an independent recollection of whether S.H. appeared to be afraid when Mr. Parmer was on top of her even after reviewing her prior statement during an interview with the prosecutor, the prosecutor then asked, "Okay. So you were **lying** to myself and Mr. Kirkhart?" (Trial Tr., p.610, L.14 – p.611, L.17 (emphasis added.)) The district court sustained Mr. Parmer's objection to this argumentative and inflammatory question. (Trial Tr., p.611, Ls.18-19.) Rather than abide by the court's ruling and moving on to another subject matter, the prosecutor immediately followed suit with a question that was virtually identical to the one ruled inappropriate by the district

[5] This Court may wish to note that the prosecutor in this case was also the same prosecutor who was found to have committed misconduct in *Ellington*.

court: "You were **not telling the correct version of what happened** when you spoke with Mr. Kirkhart and myself?" (Trial Tr., p.611, Ls.21-23 (emphasis added.)) At this point, Mr. Parmer both objected to this nearly identical question and requested that the district court admonish the prosecutor. (Trial Tr., p.611, L.25 – p.612, L.1.) The district court declined to admonish the prosecutor, but did again sustain the objection. (Trial Tr., p.612, L.2.)

The prosecutor returned to his accusations that Ms. Seeling was lying a third time, accusing her of being untruthful in her trial testimony because she did not inform police on the morning following the alleged rape that S.H. had placed her hands down Ms. Seeling's pants. (Trial Tr., p.625, Ls.7-20.) As before, the district court sustained Mr. Parmer's objection to this question. (Trial Tr., p.625, Ls.21-23.)

Very shortly after Mr. Parmer's third objection to this type of question was sustained, the prosecutor again asked a nearly identical question a **fourth** time. When Ms. Seeling stated her belief that she had informed the prosecutor of the sexual contact between her and S.H., the following exchange took place:

MR. VERHAREN: Why would you lie to myself and Mr. Kirkhart?

MR. CHAPMAN: Objection, your Honor, to the nature of the question.

THE COURT: Sustained.

MR. CHAPMAN: I'd ask that you admonish counsel about this line of questioning, sir.

THE COURT: Well, that's argumentative, Mr. Verharen. Rephrase your question, please.

(Trial Tr., p.626, Ls.12-20.)

These questions were all improper. The prosecutor in this case was accusing Ms. Seeling of lying at trial when, for most of these questions, she merely could not

remember the facts at issue; and also because the prosecutor's insinuations that Ms. Seeling was lying were calculated to inflame the passion and prejudice of the jury. Moreover, there is no meaningful distinction between the prosecutor's first question and his immediate follow up question, as "lying" and "not telling the correct version of what happened" are basically synonymous. *See* http://www.merriam-webster.com/dictionary/lying (defining the term "lying" to mean "marked by or containing falsehoods) (last visited December 21, 2012). The third and fourth questions were likewise substantially the same as the question initially determined by the district court to have been inappropriate. Accordingly, the prosecutor in this case intentionally and repeatedly disregarded the district court's ruling that these questions were not permissible.

In addition to this, the prosecutor asked Ms. Seeling twice whether Mr. Parmer removed S.H.'s pants, and each time Ms. Seeling responded that she did not know. (Trial Tr., p.614, L.20 – p.615, L.3.) After the prosecutor directed Ms. Seeling to a particular page of the transcript of her prior unsworn statement, and asking whether she then recalled whether Mr. Parmer removed S.H.'s pants, Ms. Seeling again reiterated that she did not remember and did not know. (Trial Tr., p.615, Ls.4-15.) Despite Ms. Seeling repeatedly answering that she did not know whether Mr. Parmer removed S.H.'s pants and did not recall her statement, the following exchange occurred:

MR. VERHAREN: So at some point, you told somebody that you think Mr. Parmer ripped [S.H.'s] pants off of her?

MR. CHAPMAN: Objection, your Honor. Lack of foundation, personal knowledge.

THE COURT: Yeah, sustained.

MR. VERHAREN: And he ripped those down to her ankles?

MR. CHAPMAN: Same objection, your Honor. This is asked and answered.

THE COURT: Sustained.

(Trial Tr., p.615, Ls.16-25.)

Prior to asking Ms. Seeling whether she has previously stated that Mr. Parmer had "ripped" S.H.'s pants off, the prosecutor was aware that she had no recollection of that statement, even having attempted to refresh her recollection with that prior statement. Accordingly, the prosecutor's initial question about this statement, in the face of Ms. Seeling's testimony that she did not recall the statement, was improper. More important, immediately following the district court's ruling that this question was not permissible, the prosecutor in this case merely continued in the exact same line of questioning - undeterred - in the face of the court's adverse ruling. Even if the prosecutor was unaware that his question was improper prior to the district court's adverse ruling, he certainly was made aware that this line of question was not permitted when the court sustained Mr. Parmer's objection. Rather than move on to a permissible line of questioning, however, the prosecutor merely elected to ignore the court's ruling. This was plainly misconduct.

Finally, the prosecutor once again persisted in presenting questions deemed inadmissible by the court when he repeatedly questioned Ms. Seeling about whether she believed that the encounter between S.H. and Mr. Parmer was consensual in light of pictures taken of S.H.'s bite marks. This final exchange prompted the district court to give a far sterner admonition to the prosecutor that the court's prior warnings:

MR. VERHAREN: This opinion that Mr. Chapman asked you about and that you gave us, you're giving us that opinion after looking at those bite marks on that girl's body?

MR. CHAPMAN: Objection; argumentative your honor.

THE COURT: Sustained.

MR. VERHAREN: Well, how can you think that his advances were not unwanted when you look at these bite marks?

MR. CHAPMAN: Objection; same objection, your Honor.

THE COURT: Sustained. Mr. Verharen, she'd testified as to her knowledge of these marks. The question did not refer to her opinion only but what was going on at the time. Sustained. Stay away from this.

(Trial Tr., p.638, Ls.7-24.)

The common thread in the pattern of misconduct in this case is that, not only were the State's questions clearly improper because they employed "inflammatory language seemingly calculated to arouse negative emotions," but the prosecutor in this case repeated the inflammatory questions on several occasions following the district court's rulings that these questions were inadmissible. *See Phillips*, 144 Idaho at 87. This is not the type of case where the prosecutor could not be faulted for failing to anticipate the district court's evidentiary rulings regarding the permissibility of the prosecutor's questions, nor did the prosecutor in this case immediately abandon his improper questions and change course upon being made aware of their impropriety. *Compare State v. Danson*, 113 Idaho 746, 749-750 (Ct. App. 1987).

Given the volume of the inappropriate questions, Mr. Parmer asked the district court twice to admonish the prosecutor regarding this misconduct. (Trial Tr., p.611, L.25 – p.612, L.1, p.626, Ls.12-20.) And the district court did, in fact, admonish the prosecutor for his improper questions three times during the course of the prosecutor's cross-examination of Ms. Seeling. (*See* Trial Tr., p.613, L.21 – p.614, L.2, p.626, Ls.12-20, p.638, Ls.20-24.)

Mr. Parmer further asserts that, even if the individual acts of misconduct do not warrant reversal of his conviction individually, the repeated instances of misconduct - when viewed in the aggregate – cannot be said to be harmless. "[T]he cumulative error doctrine requires reversal of a conviction where there is 'an accumulation of irregularities, each of which by itself may be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process.'" *State v. Field*, 144 Idaho 559, 572-573 (2007) (quoting *State v. Moore*, 131 Idaho 814, 823 (1998)). Where a prosecutor asks multiple questions that individually are misconduct, this Court can review the aggregate effect of that misconduct under the cumulative error doctrine. *State v. Harrison*, 136 Idaho 504, 508 (Ct. App. 2001).

In sum, this is not a case where the prosecutor engaged in a small, isolated and fairly insignificant misstep with regards to remaining within the bounds of proper cross-examination. Rather, the prosecutor in this case engaged in a protracted pattern of asking improper questions and then persisting in re-iterating these proscribed questions in the face of adverse rulings from the trial court. As put by the U.S. Supreme Court in *Berger*, "we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger*, 295 U.S. at 89.

The prejudicial impact this misconduct had on Mr. Parmer's right to a fair trial is especially pronounced given the importance of Ms. Seeling's testimony to the defense. Because Mr. Parmer did not testify at trial, Ms. Seeling was the only other witness who testified before the jury who was there on the night of the alleged rape. By her own

testimony, she was present in the basement the entire time that S.H. and Mr. Parmer were on the bed together and did not observe anything that she believed to be non-consensual contact between the two. Given this, the prosecutor's inappropriate questions and, in particular, his repeated assertions that Ms. Seeling was lying were especially harmful to Mr. Parmer's defense. Moreover, the State's evidence in this case was not overwhelming; and the jury's verdict itself reflected that the jury did not entirely accept the State's evidence in light of the fact that the jury acquitted Mr. Parmer of rape and only convicted him of the lesser included offense of battery with intent to commit rape. *See State v. Lilly*, 142 Idaho 70, 74 (Ct. App. 2005).

In light of the centrality of Ms. Seeling's testimony to this case, and the volume and flagrancy of the pattern of misconduct engaged in by the prosecutor in this case, Mr. Parmer asserts that this misconduct was not harmless. Accordingly, he asks that this Court vacate his judgment of conviction and sentence for battery with intent to commit rape.

CONCLUSION

Mr. Parmer respectfully requests that this Court vacate his judgment of conviction and sentence for battery with the intent to commit rape, and remand his case for further proceedings.

DATED this 28th day of December, 2012.

SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of December, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOHN P LUSTER
DISTRICT COURT JUDGE
E-MAILED BRIEF

J BRADFORD CHAPMAN
KOOTENAI COUNTY PUBLIC DEFENDER'S OFFICE
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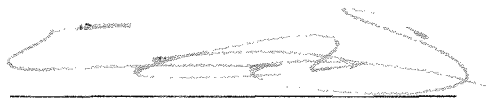

EVAN A. SMITH
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SET/eas